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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 434

FRANK BLOCH, ET AL.,

Petitioners,

vs.

MARIE LOUISE BRILL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent opposes the Petition for a Writ of Certiorari on the following grounds:

First, the questions raised have significance only with respect to a small remaining portion of this litigation, since the great majority of the claimants, holding over eighty per cent of the dollar amount of claims, participated in settlements approved by the District Court.

Second, the questions are dependent upon facts peculiar to this litigation; it is not at all likely that a comparable set of facts will arise again in a context in which the same possible issues of California and Illinois law are involved. Moreover, the questions are not of general importance.

Third, from the Petition itself it is clear that there is no conflict between the decision below and the state authorities referred to by Petitioners. Realistically, there is a virtual absence of precedent in either California or Illi-

nois; New York is the only state in which there have been any higher court decisions with respect to the validity of assignments of remainder interests under circumstances similar to those involved here.

QUESTIONS PRESENTED.

1. With regard to Question No. 1, Respondent would note only that the decision below does not hold that a transaction such as that described "must be treated as a usurious loan." The decision reaches that result, but only after consideration of the entire record (Pet. Cert. App. A, p. 14).

2. With regard to Question No. 2, for reasons urged under Point II of the argument (pp. 9-10 *infra*), Respondent believes that the result would not be affected by applying the California, instead of the Illinois, maximum permitted rate of interest.

STATEMENT OF THE CASE.

The present Petition is the most recent of five attempts to bring portions of the *de Korwin* litigation to this Court. Since the original proceeding was filed in 1943, to construe the will of Otto Young and for an accounting, the cause has been before the Court of Appeals for the Seventh Circuit on six occasions. *De Korwin* v. *First National Bank of Chicago, etc., et al.*, 156 F. 2d 858 (1946), cert. den. sub nom. *First National Bank of Chicago* v. *de Korwin*, 329 U. S. 795 (1946); 179 F. 2d 347 (1949), cert. den. sub nom. *Pratt* v. *de Korwin*, 339 U. S. 982 (1950); 235 F. 2d 156 (1956); 267 F. 2d 337 (1959), cert. den. sub nom. *Berson* v. *Kaufman*, 361 U. S. 931 (1960); 275 F. 2d 755 (1960), cert. den. sub nom. *Jones* v. *Kaufman*, 364 U. S. 824 (1960).

The latest decision of the Court of Appeals, reported at 318 F. 2d 176 (C. A. 7th 1963) and reprinted as Ap-

pendix A of the Petition, is thus part of a long and complex case.

The litigation, however, is nearly over, and only peripheral issues remain. The principal undisposed-of matter has to do with a remnant of what were originally over $4,000,000 in assignments of dollar-amount portions of remainder interests under the trust estate created by Otto Young's will. Only a small fraction of this total still must be adjudicated or settled.

Respondent Marie Louise Brill, one of Otto Young's grandchildren, made assignments over a period of years to Leonard Levy and Samuel Cohen totalling $1,320,000; these were reassigned in varying amounts by the assignees to over one hundred thirty different subassignees. In December of 1960, the District Court approved an agreement in compromise between Mrs. Brill and holders of more than 80 per cent of the $1,320,000 in assignment claims, settling those claims for approximately 65 cents on the dollar. The unsettled claims are held by only eleven or twelve individuals, of whom eight are here Petitioners. In March of 1961, in order to pave the way for the implementation of the December 1960 settlement decree, the District Court authorized the payment to all but one of the non-settling claimants of 42½ cents on the dollar on the face amounts of their claims. Petitioners received such payments on account of their subassignments without prejudice to their rights to continue to litigate with respect to the balance (R. 57-61).

Viewed in light of the above background, the "Statement of the Case" in the Petition, taken together with the facts set out in the opinion of the Court of Appeals (Pet. Cert. App. A, pp. 10-18) and the statement of facts in the Report of the Master (R. 64-83), as supplemented by the Decree of the District Court (R. 99-103), is sufficient for purposes of presenting the issues.

ARGUMENT.

I.

THE LITIGANTS WHOSE CLAIMS REMAIN ARE FEW IN NUMBER, AND THE AMOUNTS THEY CLAIM ARE SMALL. FURTHERMORE, THE ISSUES DEPEND UPON A SPECIALIZED SET OF FACTS HAVING LITTLE GENERAL SIGNIFICANCE.

What is left of the assignment litigation is no more than a small scrap. Originally, approximately one hundred thirty claimants sought portions of Respondent Marie Louise Brill's remainder interest in the Otto Young Trust Estate. Of this number only eleven or twelve are left, including the eight Petitioners. The assignees originally sought $1,320,000, plus interest and attorneys' fees; the remaining claimants—all but one having received 42½ cents on the dollar on account—are pressing claims representing in face amount less than 12 per cent of that original total.

Moreover, the two particular assignments involved in this Petition—designated in these proceedings as MAR-B and MAR-C and having a face amount of $350,000—originally concerned approximately sixty subassignees, including the eight Petitioners. As the Petition discloses (Pet. p. 4), these eight remaining claimants claim $68,500; since they all received 42½ cents on the dollar on account, however, their actual claims total only $39,387.50.

A review by this Court of the legal issues urged by the eight Petitioners would probably not significantly affect anyone other than Respondent and Petitioners, and the claimed $39,387.50. The other claims—other than those presented in this Petition with respect to MAR-B and

MAR-C—have their origins in five separate assignments, namely, those designated as MAR-D, MAR-E, MAR-I, MAR-J, and MAR-K. MAR-I and MAR-J were assignments to another assignee, Samuel Cohen, and they grew out of a course of dealing between Marie Louise Brill and Samuel Cohen which commenced in mid-1949, prior to any assignments to Leonard Levy. MAR-E was executed in New York, not California. MAR-K involves a factual background markedly different from any of the others. And even MAR-D—probably the assignment most similar to MAR-B and MAR-C (the two assignments at issue in this Petition)—was entered into as a distinct and separate transaction six months after MAR-B and MAR-C.

Thus the questions which Petitioners seek to have this Court review may do no more than settle issues applicable to just the two assignments before the Court, namely, MAR-B and MAR-C. It probably would not materially facilitate resolution of the remaining issues in the litigation involving Respondent's other assignments.

In any event, the record discloses that many of the facts necessary to raise the issues urged by Petitioners are sufficiently peculiar to this case as virtually to preclude their recurrence. The facts which the Master, the District Court, and the Court of Appeals considered significant include the following: the nature of Respondent's interest—a vested remainder subject to being divested in the event that Respondent predeceased the life tenant, her mother, leaving issue her surviving; Respondent's age, that of her mother, and the ages of Respondent's three children; the wording of the assignment documents themselves; the sums of money received by Respondent for the assignments; the amount of insurance taken out by the original assignee, Leonard Levy, on connection with the assignments; the payment by Respondent of the initial premium on one of the

insurance policies; the written calculations by Leonard Levy showing how he arrived at the amounts he paid Respondent for the assignments; the subassignments made by Leonard Levy, and the amounts he received for those subassignments from the subassignees; the return anticipated by Leonard Levy, after taking into account what he paid, insurance costs, and interest, over the probable life expectancy of the life tenant.

Facts such as these affect only a handful of persons; a few remaindermen under long-lived testamentary trusts such as that of Otto Young, and a number of specialists, such as Leonard Levy, who advance money to heirs and remaindermen on assignments cast in the form of sales.

The present litigation is of interest to the litigants. Its importance beyond that narrow circle is slight.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE LAW OF CALIFORNIA OR OF ILLINOIS AS EXPRESSED IN THE DECISIONS OF THE HIGHEST COURTS OF THOSE STATES.

The sole ground for seeking review in this Court is the claim that "the Court of Appeals has decided an important question of state law in a way in conflict with applicable state law" (Pet. Cert. p. 5). As has been suggested under Point I above, the question of state law, while doubtless of significance to the litigants, has little if any general importance. Even assuming that there were conflict, the Petition does not present one of those "exceptional cases" appropriate for this Court's attention. Cf. *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

A reading of the Petition, however, discloses that there is no conflict. Petitioners do not cite a single opinion of a California or Illinois appellate court involving the defense

of usury to the validity of assignments, cast in the form of sales, of dollar-amount portions of vested remainders which are subject to being divested in the event the remainderman predeceases the life tenant, where the hazard that the remainderman will die before the life tenant is eliminated by insurance on the life of the remainderman. The reason is simple: there are no such decisions. As far as appears after diligent research, the California and Illinois courts have not had occasion to pass upon the issue. The New York courts, by way of contrast, have dealt with the question at length, in many opinions, over a considerable span of years. The applicable New York authorities were exhaustively considered in an earlier portion of this litigation. *De Korwin* v. *First National Bank, et al.*, 170 F. Supp. 112 (D. C. Ill. 1958), aff'd 275 F. 2d 755 (C. A. 7th 1960), cert. den. sub nom. *Jones* v. *Kaufman*, 364 U. S. 824 (1960). That decision involved assignments made by Respondent's brother; as the Petition notes (Pet. Cert. p. 6), it turned on New York law, since the assignments were executed in New York.

What Petitioners object to, realistically, is that the Court of Appeals, finding nothing directly in point in California or Illinois, turned to the common-law principles as they had been developed in decisions of the New York courts. Having only recently had occasion to review the New York decisions in detail, in connection with Respondent's brother's assignments, the Court of Appeals noted the remarkable points of similarity between Respondent's assignment transactions and those of her brother, concluding that Respondent's assignments were also in actuality loans.

Of necessity, when a federal court is called upon to decide a question of state law and is unable to locate any pronouncements on the issue by the state courts, it must

exercise its own independent judgment. Cf. *Meredith* v. *City of Winter Haven*, 320 U. S. 228, 236-38 (1943); *Damon & Jarvis Bldg. Corp.* v. *Mechanics' Ins. Co.*, 83 F. 2d 793, 794-95 (C. A. 7th 1936), cert. den. 299 U. S. 556 (1936); *Toomey* v. *Toomey*, 98 F. 2d 736, 739 (C. A. 7th 1938); *New York Life Ins. Co.* v. *Jackson*, 98 F. 2d 950, 952 (C. A. 7th 1938), cert. den. 305 U. S. 641 (1938).

Petitioners contend that in three particulars there is conflict with California law (Pet. Cert. pp. 7-8). Analysis of the points mentioned, however, indicates that the decision of the Court of Appeals does not contravene any California decision in any respect.

1. The Court of Appeals did not restrict the alienability of vested remainder interests. The effect of its decision is simply to prevent transactions said to be sales from being used as cloaks for loans whereby the party who advances funds secures for himself an exorbitant return. A bona fide sale of a remainder interest in California is not disturbed in the slightest. The contention that the Court of Appeals reached its decision in the teeth of *Sinclair* v. *Crabtree*, 211 Cal. 524, 296 Pac. 79 (1931), is untenable.

2. Despite Petitioners' arguments to the contrary, the illegal return was exacted from Respondent. Not only was the insurance on her life "exacted by Levy" at Respondent's expense, as the Court of Appeals noted (Pet Cert. App. A, p. 15), but the enormous return which Levy anticipated was clearly to come out of Mrs. Brill's share of the trust estate. The decisions cited by Petitioners to show that the Court of Appeals reached its result in face of contrary California law are not in point. *Refinance Corp.* v. *Northern Lumber Sales, Inc.*, 163 Cal. App. 2d 73, 329 P. 2d 109 (1958), involved a contract for factoring or purchasing receivables; the California court specifically held that the transaction was a real purchase, not a loan;

a determination which put an end to the defense of usury. In the present case, however, the Court of Appeals, affirming the District Court, concluded: "The facts unerringly point to the conclusion that this transaction is a loan" (Pet. Cert. App. A, p. 14).

The California decision principally relied on by Petitioners, *Martyn* v. *Leslie*, 137 Cal. App. 2d 41, 290 P. 2d 58 (1955), was considered by the Court of Appeals; in fact the Court noted that in *Martyn* v. *Leslie* "no agreement to procure life insurance or any other kind of insurance was there involved." It concluded that the *Martyn* decision "is not inconsistent with the result which we reach in this case" (Pet. Cert. App. A, p. 15). *Martyn* v. *Leslie* presented a complicated set of facts quite remote from those involved here. The excessive return there, if realized, would have come from third persons and not from the parties claiming to be borrowers. In the present case, Respondent's share in the trust estate was the intended source of Levy's excessive gain. Even the insurance costs were calculated as charges against Respondent's interest (R. 191-94), and the initial premium on one policy was paid by her. *Martyn* v. *Leslie* does not represent conflicting California law.

3. Petitioners' reliance upon *Schiff* v. *Pruitt*, 144 Cal. App. 493, 301 P. 2d 446 (1946), is equally misplaced. There the return, over and above the principal amount of the loan, depended upon what the court characterized as "matters of speculation", namely, the sales prices of unbuilt houses. In the present case, Levy's principal—the $75,000 he advanced to Mrs. Brill—and interest and insurance costs were fully protected by the $175,000 insurance on Mrs. Brill's life. Petitioners concede that at the Illinois maximum rate of interest of 7 per cent "the difference between the anticipated return and the net investment" would represent a return in excess of that maximum (Pet.

Cert. p. 6). They argue, however, that the Court of Appeals should have considered the 10 per cent rate permitted in California. The calculations employed to show that the result would have been different (Pet. Cert. p. 8) are misleading. Petitioners have taken gross insurance premiums per year; they make no allowance for cash surrender values, even though the record is clear that the policies on Mrs. Brill's life resulted in cash values (R. 383-383h). Furthermore, Petitioners ignore the fact that $2,000, the first year's premium on a $100,000 policy, was paid by Mrs. Brill, as the Court of Appeals observed (Pet. Cert. App. A, p. 14). Given the life expectancy of the life tenant as established in the record (R. 78), namely, 9.41 years, taking into account the initial insurance premium paid by Mrs. Brill, and allowing for cash surrender values, it is plain that even the 10 per cent interest permitted in California was not at hazard.*

4. The Court of Appeals did not fail "to follow the governing conflicts of law principles of Illinois" (Pet. Cert. p. 9). The Illinois cases cited by Petitioners, and particularly *George* v. *Haas*, 311 Ill. 382, 143 N. E. 54

* Ten per cent interest on $75,000 for 9.41 years amounts to $70,575; gross annual insurance premiums of $4,391.50 (R. 209-11) for nine years total $39,523.90, after deducting $2,000 initially paid by Respondent, the figure is $37,523.90. Thus the $75,000 advanced by Levy, interest for 9.41 years, and $37,523.90 in gross insurance premiums for which Levy was obligated total $183,098.90. But gross insurance costs must be reduced by cash surrender values, since the record shows that the insurance on Respondent provided for such values (R. 383-383h). Actuarial evidence as to the cash values of the policies (R. 301-02) makes it clear that net insurance costs would be less than half the gross premiums. The $175,000 insurance on Mrs. Brill's life was therefore more than sufficient to provide Levy with interest at the maximum 10 per cent permitted in California, even assuming Levy's claimed other out-of-pocket expenses of $2,780 (R. 193-95). Not only was Levy's principal secured, the maximum legal interest on that principal was secured as well.

(1924), fully support the conclusion of the Court of Appeals that the usury issue was governed by Illinois law. As a matter of fact, the Court of Appeals might have extended the applicability of Illinois law for the purpose of employing it in determining the nature of the assignment transactions. *Walker* v. *Lovitt*, 250 Ill. 543, 546, 95 N. E. 631, 632 (1911), relied on by Petitioners, simply holds that, when the instrument is silent as to place of payment, it "is presumed to be the place of making . . ." And *Reighley* v. *Continental Illinois Bank*, 390 Ill. 242, 247, 61 N. E. 2d 29, 32 (1945), does not stand for the proposition urged by Petitioners; that decision is entirely consistent with the general conflicts rule laid down in *George* v. *Haas*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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